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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE* CHARLESTON NAVAL COMPLEX REDEVELOPMENT AUTHORITY IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE* CHARLESTON NAVAL COMPLEX REDEVELOPMENT AUTHORITY

The Charleston Naval Complex Redevelopment Authority ("RDA") files this brief as *amicus curiae* in support of the position of Respondent South Carolina State Ports Authority.[1] RDA submits this brief with the written consent of all parties, copies of which accompany this brief. *See* Sup. Ct. R. 37(3)(a).

[1] Counsel for *amicus curiae* RDA authored this brief in its entirety. No person or entity other than RDA provided monetary support for the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

The RDA was created by virtue of Executive Order 94-22, signed and executed by the Honorable Carroll A. Campbell, Jr., Governor of the State of South Carolina, on September 30, 1994. The Executive Order was issued pursuant to the authority granted to the Governor and set out in the *Military Facilities Redevelopment Law,* Act No. 462, signed into law by Governor Campbell on June 30, 1994. S.C. Code Ann. § 31-12-10 *et seq.* (hereinafter "Redevelopment Law").

The RDA is a state authority that constitutes "a public body, corporate and politic, exercising public and essential governmental powers." S.C. Code Ann. § 31-12-70. RDA was established with the purpose and authority to acquire, manage, and dispose of the United States-Charleston Naval Complex ("Naval Complex") pursuant to an enactment of the General Assembly of the State of South Carolina. The South Carolina General Assembly established the RDA in response to the U.S. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, to oversee the disposition of real and personal federal property that has been or will be turned over to the State of South Carolina. S.C. Code Ann. § 31-12-40(A).

The Redevelopment Law provides that the RDA is an agency of the State of South Carolina for purposes of the South Carolina Tort Claims Act (hereinafter "S.C. Tort Claims Act"). S.C. Code Ann. § 31-12-110. The S.C. Tort Claims Act provides that the "remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees or its agents." S.C. Code Ann. § 15-78-20(b). The S.C. Tort Claims Act also provides that:

> Nothing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.

S.C. Code Ann. § 15-78-20(e).

In 1999, a private complainant, Carolina Marine Handling, Inc., commenced a complaint action against RDA before the Federal Maritime Commission ("FMC"). The complainant seeks an award of monetary damages from RDA. That action is stayed pending this Court's determination of the question currently before it. RDA asserts that sovereign immunity principles arising from RDA's status as an arm of the State of South Carolina immunize it from private complaints filed before the FMC.

The Court's issuance of a writ of certiorari to the Fourth Circuit Court of Appeals raises issues of direct and immediate concern to RDA. This Court's ruling will determine whether the FMC may allow the private complaint proceeding against the RDA to continue. To that extent, the interests of RDA and Respondent South Carolina Ports Authority are congruent. However, unlike the Respondent, RDA's core functions do not include traditional maritime activities subject to regulatory or enforcement oversight by the FMC acting in its enforcement or investigatory capacity. Rather, RDA's mission involves a wide array of commercial, economic, and land-use development activities generally unrelated to the maritime commerce of the United States. If RDA's assertion of sovereign immunity against unconsented administrative litigation is unavailing, RDA will be forced to defend not only against claims for monetary damages, but also will incur substantial expense in defending its position that it is not a marine terminal operator subject to the personal or subject matter jurisdiction of the FMC.

ARGUMENT

Marine terminal activity and the public and private entities who provide marine facilities are subject, for certain

statutorily enumerated purposes, to the regulatory oversight of the FMC. The provisions of federal law that apply to marine terminals generally require observance of reasonable practices, prohibit unreasonable refusals to deal (46 U.S.C. app. § 1710(b)(10)) and forbid the grant of unreasonable preferences or advantages (46 U.S.C. app. § 1709(d)(4)). Since the enactment of the progenitor federal statute addressing marine terminal practices, the Shipping Act, 1916, 46 U.S.C. app. § 801 *et seq.*, both private entities and state and municipal authorities have been participants in the provision of marine terminal facilities and activities subject to FMC regulation. To the extent there was ever doubt as to whether state port enterprises were subject to direct FMC regulation, these doubts were long ago resolved in *California v. United States*, 320 U.S. 577 (1944), where this Court con-firmed that state and local government entities that provide regulated facilities or services to ocean common carriers are "persons subject" to FMC regulation. The instant case thus in no way places in question the general regulatory authority of the FMC over terminal operations conducted by state authorities.

At issue is whether the complaint proceedings of section 1710(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, somehow permit private citizens to compel unconsenting states to endure administrative litigation before the FMC in actions seeking monetary damages and other forms of relief for alleged violations of the Shipping Act. Sovereign immunity principles clearly bar such suits before state and federal courts. The question presented squarely here is whether a state's acknowledged immunity from private suits in the courts fails to survive when litigation is commenced before a federal administrative agency. To counter the Fourth Circuit Court of Appeals holding that private party administrative complaints impermissibly invade the sovereign prerogatives of the states, the United States looks not to the initiation or conduct of the administrative litigation before the FMC, but to its outcome. The United States argues that states

subjected to administrative litigation by private complainants can ignore awards of damages because the FMC lacks coercive powers independent of Article III courts. The position of the United States thus leaves the states to protect their claims of sovereign immunity as scofflaws evading judgment at the end of a potentially arduous litigation process, rather than as sovereigns asserting rights rooted in the constitutional system at the outset of the proceedings. Moreover, the positions of the United States and the FMC necessarily imply that Congress can, without direct reference to the constitutional relationships of sovereign power between the states and the federal government, divest the states of sovereignty by establishing federal administrative tribunals to hear certain categories of disputes. This conclusion cannot be reconciled with the "dual sovereignty" assumptions reflected in the Constitution and artificially distinguishes between federal assertions of sovereignty against administrative agency action and the equally valid assertions of such sovereignty by the states. *West v. Gibson*, 527 U.S. 212 (1999).

RDA's amicus brief focuses on two arguments advanced by the FMC and the United States. They argue that the Eleventh Amendment's proscription on the exercise of "judicial power" over a "suit in law or equity" is limited, by its terms, to Article III proceedings. Because federal agency adjudication is not a creature of Article III, the FMC and the United States argue that the Eleventh Amendment does not prohibit a private complainant from proceeding against a state before a federal agency. The Eleventh Amendment does not define the boundaries of a state's sovereign immunity. A private complaint proceeding at the FMC bears sufficient indicia of the exercise of federal judicial power that an unconsenting private complaint, if allowed to proceed, would infringe the state's sovereignty and dignitary interest.

Petitioner FMC also asserts that an action commenced by private complainants promotes the uniform application of federal law. To that extent, private complainants are said to serve as *de facto* federal regulators capable of suing states as aides to the FMC. In other words, the FMC suggests that there has been or can be a delegation or assignment of its federal power to a private complainant. RDA asserts that a federal agency cannot delegate such a right. Even if such a right exists, it could not be asserted without the type of express statutory authority found in pertinent qui tam statutes. The Shipping Act does not contain any such statutory authority.

I. PETITIONERS RELY ON A CONSTRICTIVE AND OVERLY LITERAL TEXTUAL NALYSIS OF THE ELEVENTH AMENDMENT TO SUPPORT THEIR ARGUMENT THAT STATES ARE NOT IMMUNE FROM PRIVATE COMPLAINT PROCEEDINGS AT FEDERAL AGENCIES

Petitioner argues that the FMC does not exercise the "judicial power of the United States." FMC Brief at 20-23. Further, Petitioner also contends that a private complaint proceeding brought before an administrative law judge at the FMC is not a "suit in law or equity." FMC Brief at 23-25. Based upon these assertions, a private complaint proceeding brought against a state does not, according to the FMC, constitute an impermissible infringement of a state's sovereignty. The United States reinforces these arguments and places great emphasis on its view that the absence of contempt powers and the need to obtain enforcement orders from Article III courts would permit non-prevailing states to ignore adverse agency rulings at the end of the administrative litigation process. This circumstance, suggests the United States, places the FMC's complaint proceedings outside traditional judicial powers that are the proper measure of

immunities due the sovereign states under the Constitution. U.S. Brief at 16-17.

State immunity from suit is broader than the literal text of the Eleventh Amendment. FMC Brief at 17 (citing *Hans v. Louisiana,* 134 U.S. 1 (1890)). The scope of the states' sovereign immunity is not the exclusive domain of the Eleventh Amendment but is, instead, "demarcated . . . by fundamental postulates in the constitutional design." FMC Brief at 29 (citing *Alden v. Maine*, 527 U.S. 706, 729 (1999)). The FMC and the United States ignore these fundamental postulates and embark on a constrictive, literal, parsing of the text of the Eleventh Amendment to support their positions.

The Eleventh Amendment does not delimit the boundaries of a state's sovereign immunity. In understanding whether a state agency is immune from suit brought by a private complainant at a federal agency, it is important first to accept the long-held view that the Eleventh Amendment did not define or create the concept of state sovereign immunity but merely clarified the states' immunity to the extent it was called into question by *Chisholm v. Georgia,* 2 Dall. 419 (1793). As was set out by this Court, the "Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign immunity except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon,* 472 U.S. 234, 239, n.2 (1985). Indeed, as this Court recently noted:

> The phrase "Eleventh Amendment Sovereignty" is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by the Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which

> they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden v. Maine, 527 U.S. at 713. It is the underlying notion of sovereign immunity that the Eleventh Amendment reaffirmed and that today bars a private complaint proceeding against a non-consenting state before a federal agency. The *Alden* Court emphasized that a state's sovereign immunity is not co-extensive with the boundaries of the Eleventh Amendment, "[t]he bare text of the Amendment is not an exhaustive description of the State's constitutional immunity from suit." *Alden,* 527 U.S. at 736.

Despite *Alden*, Petitioner FMC claims that state sovereign immunity from administrative adjudication cannot be inferred from the history and structure of the Constitution. FMC Brief at 25. Yet, this is precisely the inference compelled by *Alden.* The absence of legislative or federal agency courts at the time of the drafting of the Constitution or the Eleventh Amendment cannot be taken to infer that a private complainant can undertake a cause of action at a federal agency that would otherwise be barred in an Article III court. The underlying principles of sovereign immunity jurisprudence do "not turn on the forum in which the suits were prosecuted." *Alden*, 527 U.S. at 733.

The FMC seeks to dilute the plain meaning of the holding in *Alden* by close analysis of the meaning of the word 'suit'. However, the *Alden* Court's use of the word 'suit' is not coextensive with the scope of the word as used in the Eleventh Amendment. In fact, the Court took pains to point out that the principle of sovereign immunity, and hence the word 'suit', is broader than the scope Article III:

> While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, "there is also the postulate that States of

> the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution. In exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design.

Alden, 527 U.S. at 730. (Citations omitted.)

Petitioner argues that the Court's decision in *Alden* is not applicable in the instant case because the "principles explicated in Alden apply, as a matter of historical origin, only to proceedings before a State's own courts." FMC Brief at 27-28. Petitioners are correct in that *Alden* does not address the specific question currently before the Court. Courts are averse to addressing questions that are not before them. However, the Court did provide explicit guidance that compels us to apply fundamental precepts to resolve questions not contemplated by the founders:

> The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in the dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution. In accordance with this understanding, we have recognized a "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard-of when the constitution was adopted." As a consequence, we have looked to "history and experience, and the established

> order of things," *id. at* 14, rather than "adhering to the mere letter" of the Eleventh Amendment, *id. at 13,* in determining the scope of the States' constitutional immunity from suit.

Alden, 527 U.S. at 727 (citations omitted) (quoting *Hans v. Louisiana*, 134 U.S. at 13-18 (1890)

Federal agency adjudication was an anomalous and unheard-of proceeding when the Constitution and the Eleventh Amendment was adopted. The growth and development of the federal administrative bureaucracy and its "increased impact on the rights and duties of citizens is a well-documented phenomenon of the twentieth century." Sun, *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial By Jury*, 1988 Duke L.J. 539, 539 (1988). In fact, the first modern administrative agency, the Interstate Commerce Commission, was not created until 1887. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 915, 923 n.50 (1988). The Court's jurisprudence, from *Hans* to *Alden*, suggests the presumption that States are immune from private complaint proceedings brought before these anomalous and unheard-of fora.

The FMC is an entity established by Congress under its Article I powers. While Congress may establish this separate administrative and judicial body, the agency is still subject to constitutional restrictions. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982) (concluding that an attempt to vest the bankruptcy court, a creation of Article I, with Article III powers was unconstitutional). Those constitutional restrictions include both the states' retained sovereign immunity and the Eleventh Amendment. As was set out in *Alden:*

> Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the State to private suits as a means to achieve objectives otherwise within the scope of the enumerated powers.

Alden, 527 U.S. at 732.

In view of this, a private complainant cannot accomplish indirectly what is denied directly. *See U.S. Term Limits, Inc. v. Thorton,* 514 U.S. 779, 829 (1995). As was set out by this Court over 100 years ago, "[w]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibitions were leveled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." *Cummings v. Missouri,* 71 U.S. 277, 325 (1867).

Because Congress cannot abrogate a state's sovereign immunity under Article I, *Seminole Tribe v. Florida*, 517 U.S. 44, 62-63 (1996), Congress cannot use the FMC, an Article I creation, to permit a private citizen to sue a state. Otherwise, Congress would impermissibly be doing indirectly what it is forbidden from doing directly, permitting a private suit against a state.[2]

As explained by the Court's cases from *Hans to Alden*, a sovereign immunity argument that relies solely on the plain text of the Eleventh Amendment is incomplete. Even if one were to accept the argument that the terms "judicial power" and "suit in law or equity" were applicable only to Article III courts, that argument will not prevail unless it can be shown that a private complaint proceeding at a federal agency against an unconsenting state does not impinge the underlying

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[2] *See also, Bailey v. Alabama*, 219 U.S. 219, 249 (1911) concluding that a (Constitutional prohibition cannot be transgressed indirectly); *Fairbanks v. U.S.*, 181 U.S. 283, 294 (1901) (noting that Congress cannot do indirectly what it is prohibited from doing directly).

notions of sovereign immunity upon which the Eleventh Amendment is based.

A. Private Complaint Proceedings at the Federal Maritime Commission Are Functionally Comparable to Article III Suits at Law for State Sovereign Immunity Purposes

This case does not present a situation where the United States Government, through the FMC, is seeking to enforce federal maritime laws and regulations against a state agency. Rather, using the FMC as a neutral tribunal, a private citizen is alleging violations resulting in compensable harm. This is the type of situation contemplated by the doctrine of state sovereign immunity generally and the Eleventh Amendment particularly. *Alden*, 527 U.S. at 716 (noting that a suit against a state by the federal government or another state "differs in kind from the suit of an individual . . . the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity."). That the forum for the litigation is an administrative agency sitting as a decider of fact and law does not remove the affront to state sovereignty that such a proceeding would have if it were before a state or federal court. *Alden* recognized that state sovereign immunity has a transcendent durability that is independent of the forum in which the suit is commenced. *Alden*, 527 U.S. at 733.

Private complaint adjudication before federal agencies was unheard of at the time of the drafting of the Constitution and of the Eleventh Amendment. To the extent that we look to the text of the Eleventh Amendment for guidance in determining if a state is immune from suit at a federal agency, the line of cases from *Hans* to *Alden* suggests a broader reading of the terms "judicial power" and "suit in law or equity" than that advanced by Petitioner. The Fourth Circuit carefully reviewed the process and procedures set out for private

complaint proceedings before the FMC and determined that for purposes of state sovereign immunity, they are functionally comparable to Article III actions.

A judicial trial in an Article III proceeding necessarily includes certain procedural and substantive safeguards sufficient to guarantee each party's right to due process. Those safeguards typically provide for: 1) adequate notice of the proceeding and the underlying issues and contentions; 2) the opportunity to confront adverse witnesses; 3) oral presentation of arguments; 4) presentation of evidence; 5) cross-examination of adverse witnesses; 6) disclosure of opposing evidence via the discovery process; 7) the right to counsel; 8) a decision based on the evidence adduced at the adjudication; 9) a determination based on findings of fact and conclusions of law; and 10) a decision by an impartial decision maker. *See Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). *See generally* 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 378-379 (3d ed. 1994). As is set out in detail below these same safeguards are provided parties to adjudication before the FMC.

The FMC's Rules of Practice and Procedure comport with the APA's procedural requirements. *See* 46 C.F.R. § 502.142 ("In complaint and answer cases formal hearings shall be conducted pursuant to 5 U.S.C. § 554."). A party to a private complaint proceeding before the FMC is accorded the type of procedural safeguards found in Article III courts. *See* 46 C.F.R.§ § 502.1, *et seq.* FMC proceedings are virtually indistinguishable from civil litigation in the federal courts. The FMC's Rules of Practice and Procedure defer expressly to the Federal Rules of Civil Procedure. 46 C.F.R. § 502.12. The following table indicates the degree to which FMC procedural rules describe a litigation process that would be familiar to federal civil litigators:

FMC Rule	Title/Substance	Federal Statute or Rule	Title/Substance
502.12	In proceedings under this part, for situations which are not covered by a specific Com-mission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative process	FRCP	
502.62(a)	Proceeding commenced by filing of complaint.	FRCP 3	Proceeding commenced by filing of complaint.
502.64(a)	Defendant shall file answer.	FRCP 12	Defendant shall file answer.
502.64(b)	Default judgment avail-able if defendant fails to answer.	FRCP 55	Default judgment avail-able if defendant fails to answer.
502.64(d)	Defendant may file counter-claim.	FRCP 13	Defendant may file counterclaim(s).
502.68	Complainant or petitioner may seek a declaratory judgment.	28 U.S.C. § 2201	Plaintiff or petitioner may seek a declaratory judg-ment.
502.71	Defendant may file motion for more definite statement.	FRCP 12(e	Defendant may file motion for more definite statement.
502.72	Intervention	FRCP 24	Intervention
502.73-74	Parties may file motion to dismiss or for summary judgment. As per FMC caselaw these track federal rules and cases.	FRCP 12; 56	Motions to Dismiss and Motions for Summary Judgment.
502.201	"General provisions concern discovery."	FRCP 26	General Provisions Governing Discovery.
502.201(d)	Duty of the parties to meet or confer" to establish a joint discovery schedule for submission to the presiding officer.	FRCP 26 (f)	Duty of parties to meet to discuss the nature of claims and to develop a proposed discovery plan and to submit a written report outlining the plan to the court.

502.201(h)	"Scope of examination." "Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party, including the exist-ence description, nature, custody, condition, and location of any books, docu-ments, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."	FRCP 26 (b)	"Discovery scope and limits." "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."
502.201(i)	"Protective orders." May be sought upon motion by a party for good cause shown.	FRCP 26 (c)	"Protective Orders." May be sought by motion upon showing of good faith.
502.202	"Persons before whom deposition may be taken": 202(a) "Within the United States.; 202(b) "In foreign countries"; and 202(c) "Waiver of objection."	FRCP 28	"Persons before whom deposition may by taken": 28(a) Within the United States"; 28(b) "In foreign countries"; and 28(c) "Disqualification for interest."
502.203	"Depositions upon oral examination": 203(a) "Notice of examination"; 203(b) "Record of examina-tion; oath; objection"; 203(c) "Motion to terminate or limit	FRCP 30	"Depositions upon oral examination": 30(b) "Notice of examination"; 30(c) "Examination and cross-examination; record of examination"; oath; object-ion"; 30(d) "Motion

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502.204	"Depositions upon written interrogatories": 204(a) "Serving interrogatories; notice" 204(b) "Officer to take responses and prepare record"; and 204(c) "Notice of filing."	FRCP 31	"Depositions upon written questions": 31(a) "Serving questions; notice"; 31(b) "Officer to take responses and prepare record"; and 31(c) "Notice of filing."
502.205	"Interrogatories to parties."	FRCP 33	"Interrogatories to Parties."
502.206	"Production of documents and things and entry upon land for inspection and other purposes."	FRCP 34	"Production of documents and things and entry upon land for inspection and other purposes."
502.207	"Requests for admission"	FRCP 36	"Requests for Admission"
502.209	"Use of deposition at hearings."	FRCP 32	"Use of depositions in court proceedings."
502.210	"Refusal to comply with orders to answer or produce documents; sanctions; enforcement"	FRCP 37	"Failure to make or cooperate in discovery; sanctions."

In addition to these procedural similarities between FMC and trial court procedures, support for the Fourth Circuit's conclusions may be found in this Court's grant of absolute immunity to administrative law judges ("ALJ") from damages liability for their judicial acts. *Butz v. Economou,* 438 U.S. 478 (1978). The Court in *Butz* held that ALJs were entitled to the same type of absolute immunity accorded to Article III judges in 1871. *Id.* at 508 (citing *Bradley v. Fisher,* 13 Wall. 335 (1872)). In so holding, the Court found that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be

immune from suits for damages." *Id.* at 512-513. The Court proceeded to set out those shared characteristics:

> The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.

Butz, 438 U.S. at 513 (citations omitted).[3]

As to the role of the ALJ in administrative agency adjudication, the Court in Butz asserted, "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge. He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Id.* at 514.

The *Butz* case accorded ALJs the same immunity from suit accorded to Article III judges. The analogy between the immunity from suit accorded ALJs and the immunity from suit sought by respondents is striking. Both cases relate to the underlying dignitary interest of the party seeking immunity. Judge Learned Hand, speaking for the Second Circuit on the question of immunity for public officials, stated that "[t]he justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as

[3] RDA does not assert that private complaint proceedings represent "the" judicial power, "a" judicial power or "some" judicial power of the United States. RDA does assert that proceedings that are functionally comparable to Article III proceedings implicate a state's sovereign immunity within the Constitutional framework.

the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949).

The core concepts underlying *Butz* are fully applicable here. *Butz* invoked the concept of judicial absolute immunity to avoid the affront to those judges and prosecutors tasked with carrying out their appointed tasks. Similarly, RDA seeks the ability to protect its dignitary interests and to avoid the affront to its officers tasked with carrying out its appointed governmental functions.

While clearly not controlling of its disposition of this cause, RDA advises the Court that the issue of state immunity to suit before administrative agencies has been recently active in the lower federal courts. Three district courts have all found that the Eleventh Amendment and the correlative concept of the state's retained sovereign immunity preclude a private complaint proceeding before federal administrative law judges. *See Florida v. United States*, 133 F. Supp.2d 1280 (N.D. Fl. 2001); *State of Ohio Environmental Protection Agency v. United States*, 121 F. Supp.2d 1155 (S.D. Ohio 2000)); *Rhode Island v. United States*, 115 F. Supp.2d 269 (D.R.I. 2000). Each of these cases involved the immunity of states from administrative suits brought before federal agencies under various federal Whistleblower statutes. Each court concluded that the Eleventh Amendment and the concept of state sovereign immunity barred such suits. Each decision indicated that its grant of immunity did not hinder the ability of the United States or one of its agencies from enforcing uniform compliance with federal law. They all stand for the proposition, however, that the responsibility for

enforcement lies with responsible federal officers and not with private complainants.[4]

In *Rhode Island v. United States*, 115 F. Supp.2d 269 (D.R.I. 2000), the district court distinguished agency enforcement proceedings that seek fines and/or penalties from actions brought by private complainants seeking reparations. In holding that state agencies are immune from such actions, the court focused on the judicial-like role played by the ALJ:

> The determination turns on the nature of the proceeding, the relief sought and the role played by the governmental agency rather than on the forum in which the proceeding takes place or how the proceeding is characterized. The critical inquiry is whether the proceeding is one brought by the United States to investigate alleged violations of federal law and to compel compliance; or, whether it is one brought by a private party that seeks an award of damages or other relief against the state. . . . In this case, it is clear that, at least at the ALJ stage, the proceedings in question are not investigations or enforcement actions by DOL; but, rather, are proceedings to adjudicate the individual defendants' claims against the state for alleged violations of the whistleblower provisions.

Id. at 274-275.

In *State of Ohio Environmental Protection Agency v. United States*, 121 F. Supp.2d 1155 (S.D. Ohio 2000) the district court addressed the argument put forward by Petitioners that because federal agencies cannot enforce subpoenas or enforce judgments without recourse to Article III courts the principles of sovereign immunity do not apply,

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[4] Petitioner's arguments about maintaining the uniformity of federal maritime law are unavailing on this point. No party to this case contends that a state or any state agency engaged in activities regulated by the FMC is not subject to federal oversight and investigation. The question of the FMC's enforcement power is not an issue currently before this Court.

> The Department of Labor submits that the proceedings are conducted by the executive, rather than the judicial, branch of the government. The Department observes that, in the course of the proceedings, it may not enforce subpoenas, impanel juries, issue writs or enforce judgments without recourse to an Article III court. . . . The Court disagrees. . . . The ALJ is directed to conduct a full evidentiary hearing, administer oaths, issue subpoenas, rule on evidence, dispose of procedural requests, and make a formal Recommended Decision and Order. Most fundamentally, the record compiled by the agency, particularly the hearing conducted by the ALJ, becomes the basis for any review by an Article III court. . . . For these reasons, this Court concludes that, for the limited purposes of this case, the actions taken by the Department of Labor as a result of Mr. Jayco's complaint, became judicial actions, for purposes of the Eleventh Amendment, at the time the matter was referred to the Administrative Law Judge under 29 C.F.R. § 24.4(d)(3).

Id. at 1163-1164.

The district court in Florida applied the principles this Court reaffirmed in *Alden* to the question of state immunity from administrative litigation. *Florida v. United States*, 133 F.Supp.2d. 1280, 2001 U.S. Dist. LEXIS 18729 (N.D. Fl. 2001) The District Court responded to the notion that the phrase "judicial power of the United States" is not applicable to non-Article III proceedings by stating that "the constitutional principles embodied in the Eleventh Amendment and in the concept of state sovereign immunity are not so easily cabined." *Id.* at ____, 2001 U.S. Dist. LEXIS 18729 * 15. Noting *Alden*'s reference description of unheard of or anomalous proceedings, the Court stated that

> An administrative proceeding prosecuted against a state by a private individual was, beyond question, an "unheard of proceeding" with no precedent in "history and experience" or "the established order of things," either when the Constitution was adopted or, for that matter, until quite recently. . . . If the framers "never imagined or dreamed of" lawsuits in federal courts against states by their own citizens, they surely also did not imagine or dream of claims against states by their own citizens before a federal agency or Administrative Law Judge. . .

Id. at ___, 2001 U.S. Dist. LEXIS 18729 * 19 (emphasis added). The court concluded by noting that our historic concept of federalism requires that "Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.* at ___, 2001 U.S. Dist. LEXIS 18729 * 20 (citing *United States v. Lopez*, 514 U.S. 549, 583 (1995) (concurring opinion); *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992)).

If it would be a constitutional affront to the State of South Carolina to be placed in the dock before an Article III court in Charleston without its consent, it surely would not be less so to be compelled to defend before an administrative tribunal established and governed by rules of the FMC under delegation by Congress.

II. A FEDERAL AGENCY CANNOT DELEGATE OR ASSIGN ITS ENFORCEMENT POWERS TO A PRIVATE COMPLAINANT

Petitioner FMC advances the argument that because it is understaffed it is "necessary for private persons operating in maritime commerce to file complaints [against states or state agencies] in order to ensure that Shipping Act rights are enforced and vindicated, and the adjudication of privately-instituted complaints is an efficient substitute for agency-

initiated investigation of prohibited conduct." FMC Brief at 37. The Shipping Acts confer no special status on complainants as extensions or deputies of the FMC. Rather, parties availing themselves of the FMC's complaint procedures are presenting a specialized grievance before what respondents should be able to regard as a neutral tribunal with expertise in the subject matters at issue.

The surface logic of the FMC's argument can only be maintained if the FMC actually has the authority to delegate or assign its investigative or enforcement authority, vis-à-vis states, to a private complainant. Because the FMC has no such authority, either express or implied, this argument fails. Moreover, any such "deputization" of private entities could not be reconciled with APA requirements intended to preserve the neutrality of administrative agencies when they sit as tribunals to adjudicate complaints between private parties.

The Court has addressed the issue of whether the federal government may delegate its own authority to bring actions against the states. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). *Blatchford* held that a statute giving federal district courts original jurisdiction of suits brought by a native tribe involving federal law did not constitute a delegation to the tribes of the United States' ability to sue the states as the tribe's trustee. *Id.* at 785. The court reaffirmed that the "consent, 'inherent in the convention', to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select." *Id.* at 785. The same reasoning should apply here. No party has questioned that the FMC could proceed directly against respondent should it deem such a course necessary to the fulfillment of its statutory obligations. But it cannot overcome sovereign immunity defenses by arguing after the fact, that private complainants are in some way acting as surrogates for the

federal government. Petitioners, unlike those in *Blatchford*, cannot even make the facial argument that there is a statutory delegation of federal authority to private complainants in the Shipping Act.

A. Complainants Before The FMC Are Not "Relators" In A Qui Tam Sense

The FMC's claim that a private complainant stands in the shoes of the FMC for purposes of overcoming a state's sovereign immunity is analogous to claims made by relators in qui tam actions brought against states. Most federal qui tam actions are filed under the False Claims Act ("FCA"). 31 U.S.C. §§ 3729-3733. The FCA imposes civil liability on any "person" who knowingly presents a false claim to the United States for payment. 31 U.S.C. § 3729(a). An action may be commenced by the United States on its own behalf. 31 U.S.C. § 3730(a). Alternatively, a private party ("relator") may commence a civil action in the name of ("*ex rel*") the United States. 31 U.S.C. § 3730(b)(1).

There have been a number of cases involving qui tam suits brought by relators against a state or a state agency. The states have typically interposed a sovereign immunity or Eleventh Amendment defense seeking to bar the action. In response, the relators have argued that because they are suing in the name of the United States, the sovereign immunity of the states is no bar to a qui tam action against a state.

The dispositions of these claims have not been uniform across the circuit courts of appeals. Four circuits have held that, because a qui tam suit against a state is essentially a suit by and for the United States, the Eleventh Amendment poses no bar to the action. *See, e.g., United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d. Cir. 1998), *rev'd on other grounds, Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d

865, 868 (8th Cir. 1998); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 50 (4th cir. 1992); *United States ex rel Fine v. Chevron, USA, Inc.* 39 F.3d 957, 962-63 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (*en banc*).

Two circuits have come to the opposite conclusion and have held that qui tam actions brought by relators against states or state agencies run afoul of the Eleventh Amendment. *See, e.g., United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.2d 870 (D.C. Cir. 1999); *United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279 (5th Cir. 1999).

This Court, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), determined that a state was not a "person" as defined by the FCA. Because a state was not a person under the FCA, the Court advised that it need not reach the constitutional issue that had split the circuit courts. Because of the nature of this holding, the question of the relator's ability to sue a state in the shoes of the United States has not been disposed of with finality.

The Fifth Circuit extended the principles set out by this Court in *Blatchford* in holding that a qui tam plaintiff cannot qualify as a surrogate for the federal government. *United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279, 293 (5th Cir. 1999). The Fifth Circuit held that merely because a qui tam suit is brought by a private party "on behalf of the United States," the relator's interests and the government's do not necessarily coincide." *Id.* The Fifth Circuit, in a subsequent case, went on to highlight further the distinction between relator's and the United States government. The court of appeals noted, rightfully, that qui tam relators are not officers of the United States, they are not subject to either the benefits or the requirements of officers of the United States and they are not required to establish their

fitness for public employment. *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 757-58 (5th Cir. 2001).

The dramatic difference between qui tam relators and private complainants at the FMC renders meritless the FMC's suggestion that private complainants somehow act on the behalf of the United States in a manner that dissipates sovereign immunity claims. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. at 787. ("We of course express no view on the question whether an action in federal court by a qui tam relator against a State would run afoul of the Eleventh Amendment, but note that there is 'a serious doubt' on that score.").

Qui tam relators sue on behalf of the United States for injuries alleged to have been incurred by the United States. Private complainants at the FMC commence actions in their name and on their behalf for injuries they themselves allege they have suffered at the hands of defendant. In most instances they seek monetary damages. The FCA gives the United States considerable control over a relator's suit. The FMC has no such control over a private complainant. A qui tam relator cannot dismiss his own suit without the written consent of the attorney general. 31 U.S.C. § 3730(c). Private complainants at the FMC have no such restriction. The government may monitor a qui tam proceeding and may stay discovery in certain situations. 31 U.S.C. § 3730(c)(3)-(4). The FMC has no similar authority. The government may dismiss a qui tam suit after notice to the relator and a hearing. 31 U.S.C. § 3730(c)(2)(A). The FMC has no similar authority. In other words, private complaint proceedings are not brought "at the instance and under the control of responsible federal officers." *Blatchford*, 501 U.S. at 785.

That the FMC regards its resources as inadequate to investigate every alleged Shipping Act violation does not provide substantive grounds for compromising a state's sovereign immunity at the hands of a private complainant. The

practical concerns of the FMC's administration of its enforcement authority cannot cause state sovereign immunity to contract. *See United States ex rel. Long,* 173 F.3d at 882 (permitting a qui tam relator to sue a state in federal court based on the government's exemption from the Eleventh Amendment bar raises delegation issues that *Blatchford* so plainly questioned).

Lastly, the fact that the Shipping Act does not provide for qui tam suits prohibits the FMC from asserting that private complainants serve as de facto qui tam relators. There is no common law right to maintain a qui tam action. *See Burnette v. Carothers,* 192 F.3d 52 (2d. Cir. 1999). In *Burnette,* complainants commenced a private citizen enforcement action against a state pursuant to the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365 and other federal environmental statutes. The district court dismissed the case against the state defendants based upon their Eleventh Amendment immunity from suit. On appeal the plaintiffs argued that immunity did not apply because the complaint "was in the nature of a qui tam action and the United States is the real party in interest. *Id.* at 57. The Second Circuit disagreed. It held that there is no common law right to maintain a qui tam action. Authority must always be found in a legislative act. The United States was not, therefore, the real party in interest and hence the case against it was dismissed.

CONCLUSION

The decision of the United States Court of Appeal for the Fourth Circuit should be affirmed.

Respectfully submitted,

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